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Selective Return of Criminal Law Activity to Alaska Native Villages: Neocolonialism or Revitalization of Tribal Sovereignty?

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Summary

As Alaska struggles with criminal justice delivery to Alaska Native villages, many experiments have been undertaken or postulated which would reinvigorate criminal law activity in these rural places. Initial enthusiasm for alleviation of burdens on the formal system has been replaced with a state concern that village activity will be viewed as tribal activity. The author isolates areas where the needs of the state and villages can be met without feeding the flames of the conflict between state sovereignty and village tribal sovereignty.

Selective Return of Criminal Law Activities to Alaska Native Villages: Neocolonialism or Revitalization of Tribal Sovereignty?

by

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This paper is dedicated to Phyl Booth, with hope for a speedy recovery

Bush justice in Alaska, the delivery of criminal law services in nearly two hundred rural villages where 69 per cent of 75,000 Alaska Natives reside, was the topic of concern which sparked my interest in an academic life in Alaska. These villages, with few exceptions, are predominantly Eskimo, Indian or Aleut, accessible only by sea, river and air, relatively small (214 on average), heavily juvenile in composition and marked by a steadfast community reliance on a hunting and fishing culture termed "subsistence" in Alaska parlance. (See Conn, 1987.) Most house designated corporate recipients of a large private land base under a Congressional claims settlement of potential aboriginal rights to land and hunting and fishing; only one is located within an Indian reservation.

By most anthropological estimations and by federal court decisions these villages contain communities which are tribal, perhaps the last great collection of North American tribes not herded onto distant reservations and forced to sever their complex cultural and economic ties to the traditional lands and seas which define and sustain them (Berger, 1985). However, this same difference between other American Indian tribes and Alaska Natives who signed no treaties and rejected the reservation solution left in its wake many problems which were to haunt village communities, Alaska and the federal government when the issue of tribal and state allocation of criminal law authority is considered.

The Definition of Crime and Delivery of Criminal Justice Services

If crime comprises those acts which are labeled and processed by criminal justice bureaucracy as crime, crime rates were apparently low in the territorial days after Alaska's purchase from Russia (1864); crime rates became progressively higher after statehood in 1959 and now are said to be higher than urban or national rates (see Angell, 1981; Lee, 1988; and Copus, 1990). This generalization, in fact, conceals more than it reveals. Beyond archival accounts and, especially, reports of

government participants in the early days (village teachers and agents of the Alaska Native Service), little is known of early levels of crime except the fact that much of village crime was labeled by early non-Native observers as alcohol-related (Conn, 1980). Social control which governed intragroup behavior may or may not have been viewed as addressing "crime" by Native participants. Eskimo societies were termed "primitive anarchies" by Hoebel, an early legal anthropologist, because the groups' reactions to deviance were usually *ad hoc,* highly personalized and not institutionalized in any recognizable Western form. (See also Conn and Hippler, 1974.) Reactions to bad behavior ranged from publicly accepted execution and exile at their extreme to a victim's redefinition of many delicts as non-crimes, as in the recasting of theft as borrowing. What became crime in the eyes of a community, then, was usually dependent upon context, who did what to whom within a particular flow of interpersonal and group activities.

Outside influence and control changed this, of course. In the case of Alaska, the territory, those non-Natives on the scene influenced both what was seen as crime and how crime was treated with an early colonial process based upon experience with other Indian tribes. Direct intervention into Southeastern Indian communities by military agents and their Indian police and encouragement of village council activity by teachers in northern Eskimo villages are two examples (Conn and Hippler, 1975). Actual removal, however, of offenders from the localized process – whether traditional or reconstructed in a new colonial form – into a Western criminal justice system was a rare event, reserved only for the most serious offenses, usually murder of non-Natives by Natives (Hunt, 1987). Anecdotal accounts of the first incursions of white man's justice into the far North in both Alaska and Canada suggest that this intervention often checked acts of violence that were viewed locally as either

perfectly appropriate measures of self-defense or formally sanctioned community responses to persons who were dangerous and who deserved punishment.

In comparison with this Northern scenario, the allocation of criminal law responsibility btween tribes and the federal government in the lower 48 does not appear so different (Strickland, 1982). Initially tribes handled intratribal matters. Once removed to reservations, soldiers, Indian agents and Indian police and, later, Indian judges of law and order courts changed the process for dealing with reservation-based crimes to one similar to local American justice process off reservations (Hagan, 1966).

An early United States Supreme Court case, *Ex Parte Crow Dog* (1883), which confirmed exclusive tribal jurisdiction over crimes by Indians against Indians in Indian reserves, resulted in Congressional action that stripped away tribal authority for a select (and growing list) of serious felonies. States were left out of the equation unless non-Indians were involved or unless Congress granted them exclusive criminal law jurisdiction over "Indian country," a jurisdictional term.[1]

The pattern of appropriate reaction to crime in Alaska Native villages, as the pattern of appropriate reaction in "lower 48" Indian contexts, was governed in part by this formal jurisdictional division of authority, but more significantly, by decisions related to the allocation of scarce legal resources. That is to say, even when federal officials were unsure of village authority to deal with infractions of importance to villages, they still encouraged disposition in the villages because there was no practical alternative. These infractions included juvenile misbehavior, stealing and even interpersonal violence. Western agents in the villages sought outside intervention when village offenders did not respond to local procedures or when crimes were so violent as to merit removal of the offender from the village (Conn, 1985).

This very general pattern of reaction to crime matched the desires and expectations of federal marshalls and federal courts charged with enforcement of the law in Alaska after the First Organic Act of 1884. Strapped by a lack of resources, these outside agents were only too happy to see village law or village custom deal with the lion's share of local problems. Federal agents, of course, reflected entirely different policy agenda within Alaska depending upon their agency affiliations. Alaska Native Service teachers (and later Bureau of Indian Affairs personnel) were more inclined to encourage reeducation rather than arbitrary penal enforcement when game violations were reported than were Fish and Wildlife personnel. Indian Service personnel were usually more enthusiastic about enforcement of statutory liquor laws than were Justice Department agents because liquor was viewed by the former as a scourge on the population (Conn and Moras, 1986). Drunken Natives were sometimes viewed by their peers as crazy when drunk, but not responsible for their acts when sober so other local forms of social control did not respond. Yet, in the main, the law as delivered reflected a division of responsibility that both formal agents of Western law and community members could live with. If Alaska villages did not understand that this division of responsibility that allowed the villages to deal with most problems when they were small, but anticipated removal of offenders when they were recalcitrant or when they committed more serious crimes, was more a reflection of available resources than based on either an astute analysis of appropriate response to crime or a formal division of authority, they should be forgiven. "Messages" sent in the name of legal reform were often confused.

When Alaska was added to the Federal Indian Reorganization Act in 1936, a BIA law and order officer assisted villages in drafting of constitutions and law codes for enforcement upon their members (Peratrovich, 1972). This activity may have anticipated creation of an Indian reservation system in Alaska. While this

reservation system was never imposed in Alaska, villages were still encouraged to handle their own problems.

As discussed at length in other publications (see Conn, 1982) early agents of state law including district attorneys and troopers encouraged and did not discourage continuing use of village councils and village law as the first (and even second) line of reaction to village crime. Removal of offenders was reserved for more serious crimes because state resources were in the initial years of statehood as scarce in rural regions as had been federal resources. Yet even before statehood a *formalistic* change occurred which would later put into question this division of local and state authority.

In 1958 defendant McCord argued that his conviction for statutory rape was invalid since tribal and not territorial (federal) law should apply to this case because the incident occurred within the confines of an executive order reserve and the offense was not then covered by the Indian Major Crimes Act. Until then, federal officials had assumed that territorial law applied generally to Alaska Natives wherever they resided. The court agreed with McCord and held his case should have been handled by the village on this area of land set aside for a functioning tribe. Congress responded the next year by including the entire territory of Alaska among the jurisdictions where states (and territories) have criminal law jurisdiction over Indian country to the same extent as they do in the rest of their domain. This grant of authority may have been exclusive. David Case (1984:456) describes how the reservation of Metlakatla (the single Congressionally established Indian reservation) and the state asked Congress to permit Metlakatla and the state to share criminal law jurisdiction with the state of Alaska, allowing the state to effectively handle those serious matters which go to federal court from lower 48 Indian reservations.

More significantly, however, in many other areas of Alaska after statehood, *de facto* working relationshps between village councils and state courts in cities or in regional centers allowed this same kind of sharing of authority without Congressional action.

The breakdown and its causes

Oil development and oil wealth more than any other factor changed the configuration of criminal justice delivery in rural Alaska. The state for the first time had a surplus of resources to flesh out its criminal justice system. The model it chose, wittingly or unwittingly, was one that had been used in Canada's Northwest and Australia's Northern territories. Premised on the notion that professional justice in regional centers was preferable to lay justice either in village magistrate courts or village council justice, the regional centers of rural Alaska each came to hold a full trial court, defense attorneys and prosecutors and correctional and youth facilities. Extensions into the village occurred as each component of the state system established paraprofessional eyes and ears in rural places to report crime and sent messages forward (Conn in Lane, ed., 1987:199-229). Chief among these were village public safety officers, unarmed parapolice, who worked closely with regional troopers, but did not replace them (Alaska State Department of Public Safety, 1980). Underminded in this configuration were village councils as legal brokers and dispute adjusters. Village state magistrate positions were allowed to go empty and to dwindle (Conn, 1981). Today more than one hundred fifty villages lack a simple magistrate court to hear misdemeanors or small claims.

It is important to understand that the vision of rural justice as a professional system somewhat detached from the village politics and influence of relatives and kin was not that of white professionals only. The North Slope Borough and its Inuit leadershp used oil wealth to construct a modern and detached police system that

placed two fully professional policemen in each small Native village (NANA Development Corporation, 1976). This Native political initiative encouraged the state to put a court and both defense attorney and prosecutor in Barrow. Though somewhat scaled down in later years this unique ratio of one man in each village (or 6.5 police per thousand) guaranteed that crimes would be discovered and processed at a level far in excess of underpoliced urban centers (like Anchorage 1.4 police per thousand), often confounding investigators (Copus, 1990) who viewed rural crime as abnormally high (Alaska Court, 1989).

The crime problem that emerged statistically in rural Alaska during the 1970s and 1980s has been said to be fueled by oil wealth (Klausner and Foulks, 1982). Others suggest that high incidence of child and sexual abuse reflected a breakdown in traditional housing (Shinkwin and Peter, 1983). Yet my studies suggest that the crime problem was usually a reflection of both the changing infrastructure of the bush, especially improved transportation and communication patterns, and more efficient procedures for discovering and removing crime to urban centers. These changes occurred as use of village social control or traditional village law was discredited leaving small problems (especially juvenile problems) to be transformed into large problems suitable for formal removal (Conn, 1982). These changes in the balanced working relationship, historically based not on formal agreement, but limited federal (then state) resources, coupled with presumptive sentencing laws, resulted in sharp increases in Alaska Native inmate populations, now twice their percentage (33%) to Natives in the Alaska population (and higher if one calculates for young Native males only).

Alaska remedied the situation which had at least by the late 1960s placed too much reliance on village councils to deal with problems beyond the normal range of their resources by creating a counter system that, if anything, was too efficient in

drawing problems into its regional centers. The system had few diversionary mechanisms or means to restore some measure of authority back to local persons or institutions. Experiments in village conciliation boards in the early 1970s were abandoned by the state court system. Village parents committees faltered. Recent discussions on use of civil rules and sanctions in villages, coupled with arbitration, have, also, not progressed beyond the talking stage (Conn, 1985b).

What is the problem that inhibits the state from some reasoned sharing of its authority in rural areas, as was accomplished on the Metlakatla reservation so many years ago with or without Congressional authorization?

The answer is that bush justice issues along with virtually every other social and economic issue which could be alleviated through a reasoned sharing of responsibilities between villages and the state are caught in the whirlwind of political conflict between the villages who seek sovereign tribal recognition and consequent sovereign tribal powers and the state who would deny it. Litigation in state and federal forums now addresses the exact nature of tribal status and authority in Alaska (Miller, 1989). The state contends and its high court supports the proposition that Alaska Native villages are not sovereign tribes, that the Alaska Claims Settlement Act (ANCSA) was intended to remove whatever inherent governmental authority they possessed along with unextinguished aboriginal title to land. ANCSA, contends the state, created private land owned by state-chartered corporations not tribal land. Villages were intended to look for no more than residual municipal authority to carry out tasks of locallaw enforcement. In Alaska, a unitary court system and the high costs of enforcing one's own municipal ordinances mean that villages usually cannot create their own localized version of a state criminal justice system.

Villages, on the other hand, are emboldened by federal circuit court decisions which suggest that Congress has systematically treated them as Indian tribes in both historical and modern times. These decisions may or may not stand the test of a United States Supreme Court review.

Left unresolved is whether any part of Alaska, other than Metlakatla, is "Indian country," that is, non-reservation land settled by a dependent Indian community for jurisdictional purposes. Village sovereignty advocates argue that settlement land, protected as it is by Congress from taxation while undeveloped, is Indian country. At the least, many suggest, the village core is Indian country. Despite Congress's perhaps exclusive grant of criminal law jurisdiction over Indian country to Alaska in territorial times, Alaska now argues that there is *no* Indian country in the state other than the Metlakatla reservation. It views efforts to "retribalize land" when some ANCSA corporations turn land grants back to village governments with alarm. Not only criminal law issues are at stake, although several incidents of villagers who challenged trooper attempts at arrests in their villages have brought criminal law matters to the fore.

Chief among the concerns of state officials are matters of appearance: how would it appear to a federal appeals court if state officials allowed even *de facto* control over dispute disposition in rural villages? How might such evidence be used? State advocates have more on their minds than criminal justice. What if tribal governments gained governmental land use control and civil law authority over natural resources?

Along with this power stuggle over ultimate sovereignty – the existence of either one or more than two hundred sovereigns in Alaska – an ideological issue captures attention. At its base is a state concern that individual rights will be diminished and group rights enhanced by expressions of tribal sovereignty. Native

persons, the state argues, who are entitled to constitutional protections as citizens will be relegated to the second class rung of tribal citizenship where case law and Congress have granted few civil and procedural rights equal to those guaranteed by federal and state constitutions. Bluntly put, state advocates view tribal activity as no more nor less than a form of race discrimnation.

The subject of the struggle for sovereignty that has so enveloped and undermined any meaningful dialogue on delivery of governmental services to rural Alaska has clearer doctrinal parameters within the realm of tribal and state criminal justice. Tribal courts cannot prosecute non-Indians (and perhaps non-tribal members). Evocation of the Indian Civil Rights Act of 1968 is limited to those who are incarcerated. Tribal justice, much debated in the reservation context, is said to be fairer than justice obtainable in neighboring state courts because tribes hire their own as participants and replace historical prejudice with cultural concern coupled with an ever improving quality of training. If this is not true it is likely in Alaska that by implication Congress has already granted defendants an assured right to a hearing in state court if they so desire to leave tribal jurisdiction.

So what can be said for the future of bush justice in Alaska? What few state or tribal advocates appear to appreciate is that *even if* the United States Supreme Court affirms circuit court cases that suggest continuing recognition of Alaska Native village as tribes, the issue of power sharing within the realm of criminal (and juvenile) justice must remain open to negotiation. At best, tribal jurisdiction, argue some scholars, is concurrent jurisdiction. This means that state policymakers can continue to intervene at will into villages to remove defendants. Juvenile justice is a similarly confused domain. While some argue that it should be exclusive to the tribe within Indian country, this result seems unlikely. Further, even where Congress has explicitly sanctioned tribal courts in Alaska Native villages to deal with custody

matters under the Indian Child Welfare Act of 1978, a profound absence of resources at the village level has limited village activities where social services are required to fulfill court decisions.

If the state and villages return to some vestige of their original understanding about sharing authority for criminal justice matters, the parameters will be influenced again less by formality than by practicality. Legal retrocession by Congress to villages will not solve the problem of paying for justice systems there.

At the village level restitution and amelioration of victims' concerns can be best grafted into a shared process. Diversion programs can succeed there *if* assurance is given that removal to formal process will occur for program violations. Parental and familial control can be reinforced and not usurped. Fines can be levied and collected; alternatives to fines can be defined and enforced. Secure places can be constructed to isolate and treat juveniles and intoxicated persons. Community pressure can be mobilized and imposed upon persons who care about their community status to influence their future behavior. To alleviate state concerns, defendants could be assured the option of removal of their cases to distant regional centers.

At regional centers, professional justice and a differing level of resources should assure effective Western and not colonial justice. The relative allocation of responsibility between regional centers and villages is certain to vary across the state so variable are the circumstances of rural Alaska. This implies a level of decentralization in planning within justice agencies and a careful collaboration among representatives of justice agencies at regional levels.

If any single ingredient needs to be reintroduced to allow a relationship to proceed it is that state and regional resources must be responsive to particularized needs of local authorities. With the introduction of para-criminal justice agents, this line of communication has been severed. Modern bush justice has divorced the

system from villages more effectively than cultural barriers or than did early territorial or state justice.

Still, the movement from early colonial justice to a modern system has at least provided us with several non-theoretical views of how relationships could be redesigned to fit the needs and expectations of rural communities, the state criminal justice bureaucracy and parties to the process. Experimentation has taken place when no person thought of it as experimentation.

Selective return of criminal law authority to Alaska Native villages will involve tradeoffs and compromise on all sides. These early experiences need to be reviewed.

It is worth the effort because in village Alaska, at least, more justice will be seen to be done.

FOOTNOTES

1. 18 USCA 1151 defines "Indian country" as follows:

> Except as otherwise provided in sections 1154 and 1156 [Indian liquor laws] of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

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